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OPINION
OF
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Opinion No. 13-03

BY: Sally Malavé
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TO:
The Honorable Jacob R. Candelaria
State Senator

The Honorable Joseph Cervantes
State Senator

The Honorable Carlos R. Cisneros
State Senator

The Honorable Linda M. López
State Senator

The Honorable Howie C. Morales
State Senator

The Honorable Gerald Ortiz y Pino
State Senator

The Honorable Michael Padilla
State Senator

The Honorable Mary Kay Papen
State Senator

The Honorable Clemente Sánchez
State Senator

The Honorable John M. Sapien
State Senator

The Honorable William P. Soules
State Senator

The Honorable Richard C. Martínez
State Senator

QUESTION:

May the Governor unilaterally withhold a capital outlay appropriation made to an agency by the legislature?

CONCLUSION:

No. The Governor is not permitted under current law and the separation of powers mandated by the New Mexico Constitution to unilaterally withhold capital outlay funds properly appropriated by the legislature.

FACTS:

On May 2, 2013, Governor Martinez issued Executive Order 2013-006, titled "Establishing Uniform Funding Criteria and Grant Management and Oversight Requirements for Grants of State Capital Outlay Appropriations by State Agencies to Other Entities" ("Executive Order"). The Executive Order requires state agencies, local public bodies and other entities to have completed audits pursuant to the Audit Act, NMSA 1978, Sections 12-6-1 through 12-6-14 (1969, as amended through 2011), and to meet other criteria specified in the Order before they can receive and use capital outlay appropriations.

ANALYSIS:

Separation of Powers

Article III, Section 1 of the New Mexico Constitution commands that "[t]he powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted." The legislature makes, the executive executes, and the judiciary construes the laws. See State v. Fifth Judicial Dist. Court, 36 N.M. 151, 153 (1932). While recognizing that an absolute separation of powers "is neither desirable nor realistic," New Mexico courts have held that a violation of this doctrine occurs when the governor's actions disrupt the proper balance between the executive and legislative branches. State ex rel. Clark v. Johnson, 1998-NMSC-048, ¶¶ 32, 34, 120 N.M. 562.

The state constitution vests the governor with the "supreme executive power of the state" and directs the governor to "take care that the laws be faithfully executed...." N.M. Const. art. V, § 4. The legislature's constitutional authority to make laws includes exclusive authority to make appropriations. N.M. Const. art. IV, §§ 1, 16, 30. The constitution requires every law making an appropriation to "distinctly specify the sum appropriated and the object to which it is to be applied." Id. § 30. See also State ex rel. Sego v. Kirkpatrick, 1974-NMSC-059, ¶ 12, 86 N.M. 359.

Necessarily included in the appropriation power is the corollary "power to affix reasonable provisions, conditions or limitations upon appropriations and upon the expenditure of the funds appropriated." Sego, 1974-NMSC-059, ¶ 23. Absent a proper delegation of authority from the legislature, the governor is precluded from exercising any control over the expenditure of appropriated monies in a manner that would affect the legislature's choice of purpose. See State ex rel. Holmes v. State Board of Finance, 69 N.M. 430, 437-42 (1961). However, New Mexico courts construing the separation of powers required by the state constitution have also resisted unwarranted legislative intrusion into the executive's authority to administer appropriated funds. See N.M. Att'y Gen. Advisory Letter to Senator Kent Cravens (Dec. 16, 2006), 2006 N.M. AG LEXIS 11 (alleging unauthorized staff hirings by the governor).

Two New Mexico cases are most instructive at understanding the tension between the legislative and executive functions, especially as these relate to the legislature's authority to *appropriate* funds and the executive's authority to *administer* funds. In State ex rel. Coll v. Carruthers, 107 N.M. 439 (1988), two state legislators sought a writ of mandamus compelling then-Governor Carruthers and the Department of Finance and Administration ("DFA") to administer the General Appropriation Act of 1988 as originally passed without reference to various line item vetoes made by the Governor. The legislators claimed that the Governor's line item vetoes distorted legislative intent. After determining that mandamus was a proper procedure "to test the constitutionality of vetoes or attempted vetoes by the Governor," the New Mexico Supreme Court reviewed several line item vetoes the Governor made to the appropriations bill and his specific objections to the vetoed items. See Coll, 107 N.M. at 443.

One of the items examined by the Court was an attempt by the Governor to veto a conditional appropriation to the district attorneys. It provided that:

> [n]one of the funds appropriated to the district attorneys shall be used to purchase automated data processing or word processing equipment until a system is reviewed by the department of finance and administration and by the legislative finance committee which has also been certified by the administrative office of the courts to be compatible with a statewide computer system that has been developed under the direction of the supreme court.

Id. at 444. The Governor argued that the imposition of conditions on the purchase of certain equipment unreasonably injected the legislature into the executive managerial function. Id. Quoting Sego, the Court stated that it had consistently maintained that the legislature has the power to affix reasonable conditions, provisions, or limitations upon appropriations and upon the expenditure of funds appropriated. Id. at 444 (internal quotations and citation omitted). The Coll Court then rejected the Governor's argument that the condition violated the separation of powers doctrine and exceeded the legislature's ability to regulate the use of funds because "[w]e are dealing with a *condition precedent* (certification by the administrative office of the courts) to the expenditure of funds, not the details of managing the expenditure once approval is granted," and further stated "the executive function does not commence until after the administrative approval is first obtained from several state agencies." Id. (emphasis added). The court found the condition was reasonable because its purpose was to provide an interlocking statewide system

that would avoid expensive and extensive modifications by various state agency users in the future. Id.[1]

In State ex rel. Schwartz v. Johnson, 1995-NMSC-080, 120 N.M. 820, several district attorneys and one state senator petitioned the state Supreme Court for a writ of mandamus compelling then-Governor Johnson and certain members of the executive branch to resume monthly one-twelfth allotments of monies under the General Appropriations Act of 1995 and to restore funds already withheld.[2] See 1995-NMSC-080, ¶ 1. The issue before the Court was whether, under the Governor's existing statutory authority, the legislature intended that the Governor would make the allotments based on the regularly recurring needs of state agencies to meet the legislature's choice of purpose or that the Governor could make the allotments on other sound fiscal policy within the executive branch's discretion. Id. at ¶ 2.

The Governor's position was that the legislature had delegated allotment authority to him by statute and had supplied sufficient standards for him to proceed to temporarily reduce allotments in anticipation of future legislative ratification. Id. at ¶ 9. Under the law in effect at that time, the state budget division of the Department of Finance and Administration ("DFA") was authorized to adopt regulations for the periodic allotment of funds that might be expended by any state agency. See 1977 N.M. Laws, ch. 247, § 124, formerly codified at NMSA 1978, § 6-3-6.[3] The

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[1] The Coll Court also upheld some of the Governor's vetoes, such as language prohibiting expenditures for the rental of parking space and limiting the expenditure of appropriated monies for data processing to a specific system and specific contractor. According to the Court, the vetoed language in one way or another intruded or trespassed into the executive domain, in the form of restrictions that curtail or impede the executive's discharge of executive management functions, and were outside the proper domain of the legislature under the separation of powers provision of the New Mexico Constitution, Article III, Section 1.

[2] The general fund policy adopted by Governor Johnson amended the monthly allotments remaining in the fiscal year to reflect a two and one-half percent across the board reduction in total appropriations to encourage spending patterns that anticipate that reduction in appropriations by the legislature. 1995-NMSC-080 at ¶ 1.

[3] At the time, Section 6-3-6 provided, in pertinent part:

> The state budget division ... is authorized to provide rules for the periodic allotment of funds that may be expended by any state agency. The expenditures of any state agency as defined in [Section 6-3-1] for the first six-month period of each odd-numbered fiscal year shall be limited to one-half of the appropriation or approved budget, whichever is less, for that fiscal year.... The department of finance and administration may also allow expenditure of more than one-half of the appropriation or approved budget for those agencies planning major expenditures for capital outlay in the first six months of the fiscal year, which would result in over-expenditure of the first six-month allocation.

Governor argued that as long as his actions did not frustrate the purpose of the appropriations, the Governor's control over the allotments was clearly within his authority to administer expenditures, and did not infringe upon the legislature's power over appropriations. Schwartz, 1995-NMSC-080, ¶ 7.

The Court was not convinced by the Governor's argument, noting that it was not based on *existing* legislative choice but on *anticipated* appropriation reductions by the legislature. See id. It therefore did not perceive a factual dispute as to whether the Governor's allotment reductions could be considered consistent with legislative choice of purpose. Id. They were not. In its analysis, the Court also noted that Section 6-3-6 did not specify that periodic allotments for agencies had to be made in one-twelfth increments, and that the statute did not include specific language giving the Governor discretion to temporarily adjust allotments when cash flow in the state treasury was insufficient to adequately fund the allotments without use of general fund reserves. Id. at ¶¶ 12-15.

After reviewing cases from other states that discussed their legislatures' delegation of law-making authority to another branch of government, the scope of the powers delegated in Section 6-3-6, and the specificity of the standards to govern the exercise of the authority delegated, the Schwartz Court found no statutory authority conferring on Governor Johnson the ability to regulate allotments through the application of discretionary fiscal policy. Id., at ¶ 22. The Court opined that to withstand a constitutional challenge, Section 6-3-6 had to be interpreted to require that periods and amounts of allotments be designed to meet the constant needs of governmental agencies to achieve the purposes of the appropriation and, in the case before it, the Governor's fiscal policy was not related to those needs, nor was it based on an existing legislative choice. Id. As a result, the Governor did not have the requisite authority to withhold portions of the monthly allotments in anticipation of future reductions in appropriations by the legislature. Id.

The Coll and Schwartz decisions establish that the legislature is authorized by the constitution to enact laws appropriating money that include reasonable conditions, provisions, or limitations upon appropriations and upon the expenditure of funds appropriated. Absent express delegation of the legislature's law-making authority, constitutional separation of powers principles preclude the executive branch from effectively legislating by attaching restrictions and conditions on appropriations that are inconsistent with the legislative intent and purpose behind the appropriations.

Executive Order 2013-006

The Executive Order establishes "uniform funding criteria and grant management and oversight requirements for grants of state capital outlay appropriations by state agencies to other entities." Executive Order, p. 1. The Order requires DFA to establish uniform funding criteria for eligibility for a "grant," which is defined as "non-exchange transaction whereby a State agency makes all or part of a capital outlay appropriation available to a grantee." Id. § 1(C). A "grantee"

for purposes of the Order is "an entity to which a State agency grants or considers granting all or part of a State capital outlay appropriation." Id. § 1(E).[4]

The uniform funding criteria require a state agency, before it makes a grant of capital outlay appropriations to a third party recipient (or "grantee"), to examine the recipient's most recent annual or special audit. Grantees subject to audits under the State Audit Act must have submitted a current audit report as required by that Act. Executive Order, § 2(A)(1). If a grantee's most recent audit identifies "material weaknesses and significant deficiencies that raise concerns about the grantee's abilities to expend grant funds in accordance with applicable law and account for and safeguard grant funds and assets acquired with grant funds," the Executive Order requires: (a) the grantee to remedy the material weaknesses and deficiencies to the satisfaction of the state agency, (b) the state agency to implement special grant conditions that adequately address the grantee's weaknesses and deficiencies, or (c) the state agency to identify another appropriate entity that is able and willing to act as fiscal agent for the grant. See id. § 2(A)(2).

Similar criteria apply to a grantee, such as a private entity, that is not required to have an annual audit conducted under the Audit Act. In those instances, the Executive Order requires: (a) the grantee to demonstrate to the satisfaction of the state agency that it has adequate accounting methods and procedures to expend grant funds in accordance with applicable law and account for grant funds, (b) the state agency to implement special grant conditions that adequately address any relevant deficiencies in the grantee's accounting methods and procedures, or (c) the state agency to identify another appropriate entity that is able and willing to act as fiscal agent for the grant. Id. at § 2(A)(3). The uniform funding criteria require all grantees to have a budget approved by their oversight agencies (if any) for the current fiscal year and be in compliance with any financial reporting requirements. Executive Order, § 2(A)(4).

Compliance with the uniform funding criteria is required before DFA may authorize a state agency to certify to the State Board of Finance ("SBOF") for the issuance of severance tax bonds ("STB") for a project or make a grant to a grantee. Id. at § (2)(B).[5] We understand that, as currently applied, the Executive Order requires a state agency that plans to pay or make available appropriated STB proceeds to any entity, including another state agency, a local government, or

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[4] The Executive Order's use of the terms "grant" and "grantee" is problematic. A state agency's "grant" of public money in a "non-exchange transaction," i.e., a transaction where the state agency gives money to a recipient and receives nothing in exchange, generally would be prohibited under the antidonation clause of N.M. Const. art. IX, § 14. Our understanding is that capital outlay appropriations typically are used by state agencies to pay for goods and services related to a project. Because the Executive Order is intended to establish uniform funding criteria for the use of capital outlay appropriations, we assume for purposes of this letter that, despite its definition of "grant," the Governor did not intend the Order's requirements to be applied only to non-exchange transactions involving capital outlay appropriations.

[5] In addition to the uniform funding criteria, the Executive Order provides for the establishment of uniform grant management and oversight requirements for capital outlay projects that fall squarely within the executive function. See Executive Order, § 3.

a private entity, must ensure that the uniform funding criteria are met by each entity that receives money from the appropriation. To illustrate, if a state agency intends to provide appropriated STB proceeds to a local government agency, which in turn plans to use the money to hire a private contractor, DFA will not permit the state agency to certify to the SBOF that the funds are needed unless the uniform funding criteria are met by the local government agency and the private contractor.

Validity of the Executive Order

Using the legal principles relied on by the court in Coll and Schwartz, we turn our attention to what, if any, state laws confer sufficient discretion upon Governor Martinez to withhold capital funding appropriated to state agencies unless and until the uniform funding criteria established by the Executive Order are met.

The Executive Order cites various provisions of the financial control statutes, NMSA 1978, §§ 6-5-1 through 6-5-11, as authorization for DFA to require state agencies to comply with the Order's uniform funding criteria as a condition to receiving and using their capital outlay appropriations. See Executive Order, pp. 1-2. Specifically, the Executive Order relies on provisions that authorize DFA's financial control division to "devise, formulate, approve, control and set standards for the accounting methods of all state agencies," "prescribe procedures, policies and processing documents for use by state agencies in connection with fiscal matters," "coordinate all procedures for financial administration and financial administration and integrate them into an adequate and unified system," and "make improvements in the state's model accounting practices, systems and procedures." See NMSA 1978, §§ 6-5-2(A), 6-5-2.1(A), (Q).

As discussed above, the Executive Order requires a state agency to comply with the uniform funding criteria before the agency can use appropriated STB proceeds. The 2013 Work New Mexico Act, 2013 N.M. Laws, ch. 226 (the "Act") governs the issuance of STB for state-owned and local capital outlay projects in the current fiscal year, and provides a possible additional source of legislative authority for the Executive Order. The Act authorizes the SBOF to issue and sell STB in compliance with the Severance Tax Bonding Act, NMSA 1978, §§ 7-27-1 through 7-27-27 (1961, as amended through 2013), in an amount not exceed the total of the amounts specified by the Act "upon a finding by the [SBOF] that the project has been developed sufficiently to justify the issuance and that the project can proceed to contract within a reasonable time." 2013 N.M. Laws, ch. 226, § 2(A). The Act appropriates proceeds from the sale of STB "for the purposes specified in the [Act]." Id.

Before a state agency can obtain bond proceeds appropriated to it, the Act requires the agency to certify to the SBOF that "the money from the proceeds is needed for the projects specified." Act, § 2(B). For example, the Act requires the New Mexico Aging and Long-Term Services Department to certify that need exists in order to receive seventy-five thousand dollars ($75,000) to purchase and install meals equipment. Id. at § 5. If an agency does not certify the need for STB proceeds for a particular project by the end of fiscal year 2015, the authorization for that project is void as a matter of law. Id. at § 2(B).

To certify for the need for STB proceeds, the Act requires a state agency to demonstrate to the SBOF that the project is

> developed sufficiently, so that the agency reasonably expects to: (1) incur within six months after the proceeds are available ... a substantial binding obligation to a third party to expend at least five percent of the bond proceeds for the project; and (2) spend at least eighty-five percent of the bond proceeds within three years after the applicable bond proceeds are available.

Id. at § 2(C).

The Act confers upon the executive only limited discretion to make the certifications of need and readiness for a particular project before STB may be issued and sold. The only prerequisite to an agency's receipt of appropriated funds is the certification of need, which must be supported a showing that the project is "developed sufficiently." A project is "developed sufficiently" for purposes of the Act if the agency expects to have a binding obligation with a third party to spend at least 5% of the bond proceeds and to spend most of the appropriated money within three years.

Our review of the Act and the financial control statutes cited in the Executive Order does not reveal sufficient legislative authority for the uniform funding criteria established by the Order. The cited provisions of Sections 6-5-2 and 6-5-2.1 authorize DFA to set standards and prescribe procedures for accounting and managing state agency funds. Nothing in those provisions suggests that the legislature intended to authorize DFA to establish uniform funding criteria for an agency's appropriation, delay the necessary certifications for the issuance and sale of STB appropriated for specific capital outlay projects, or withhold capital outlay funds from state agencies and other entities for failure to meet the uniform funding criteria.

Similarly, the conditions on appropriations established by the Executive Order exceed those required by the legislature under the Act. No provision of the Act requires that state agencies or third party end-users of capital outlay funds have annual audits performed or meet the accounting requirements specified in the uniform funding criteria as a condition precedent to the issuance and sale of STB or to the expenditure of STB proceeds. Even if an agency meets the Act's requirements, the Executive Order authorizes DFA to block the agency from receiving its appropriation if the agency fails to meet the uniform funding criteria. By placing additional limits on an agency's ability to receive appropriated amounts, we believe that the Executive Order attempts to make law and improperly intrudes into the legislature's function. The uniform funding criteria, which amount to additional conditions on an agency's receipt of an appropriation that were not intended by the legislature, do not constitute a permissible exercise of the executive branch's power to manage expenditures, as described in Coll.

Although the requirements of the Executive Order may be reasonable and beneficial, the separation of powers mandated by the state constitution prevent the Governor from adding additional conditions or obstacles to an agency's appropriation that are not intended by the legislature and inconsistent with the legislature's purpose. The legislature, not the governor, is charged with making the laws, including laws appropriating money. As the Supreme Court held

in Schwartz, the executive is not permitted to adjust or regulate an agency's appropriations under fiscal policies that, however sound, are inconsistent with the legislature's existing choice of purpose.

Had the legislature intended that completed audits and related accounting requirements be a condition to capital outlay funding, we believe it would have made its intention clear. In fact, in other circumstances, the legislature already authorizes the executive to withhold distributions to state and local government agencies that have failed to submit audits. For example, NMSA 1978, Section 6-3-6 (2011), which governs periodic allotments to state agencies, expressly authorizes DFA to temporarily withhold allotments of general fund appropriations for failure to submit an audit report required by the Audit Act.[6] See also NMSA 1978 § 7-1-6.15 (2011) (authorizing the Taxation and Revenue Department, upon the direction of DFA, to withhold distributions of certain tax proceeds to municipalities and counties for failure to submit audit report required by Audit Act); NMSA 1978 § 9-6-5.2 (2011) (authorizing DFA to direct that periodic allotments and other distributions to state agencies, municipalities and counties be temporarily withheld for failure to submit timely audit and other financial reports required by law). The absence of similar express statutory authority for the executive to withhold appropriations of STB proceeds underscores our conclusion that conditions on those appropriations in the Executive Order are invalid and without effect.

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for
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[6] Section 6-3-6 is the same provision that Governor Johnson unsuccessfully relied on in the Schwartz case to reduce periodic allotments to state agencies. In 2011, subsequent to the Supreme Court's decision in Schwartz, the legislature amended Section 6-3-6 to allow DFA to temporarily withhold periodic allotments from state agencies that fail to submit an audit report, as discussed above in the text.